Supreme Court, U.S.
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No. 03-226

IN THE
Supreme Court of the United States

JOHN R. WHALEN,
Petitioner

versus

COMMONWEALTH OF KENTUCKY,
Respondent

On Petition for Writ of Certiorari to the Supreme Court of Kentucky

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BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

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COUNTERSTATEMENT OF QUESTIONS PRESENTED

I. WHETHER THE DESCRIPTION IN THE SEARCH WARRANT OF THE THINGS TO BE SEIZED MET THE PARTICULARITY REQUIREMENT OF THE UNITED STATES CONSTITUTION.

II. WHETHER THE CONSTITUTION REQUIRES SUPPRESSION OF THE VERY ITEMS SPECIFICALLY DESCRIBED IN THE AFFIDAVIT IN SUPPORT OF THE SEARCH WARRANT.

III. WHETHER CERTIORARI REVIEW IS WARRANTED WITH RESPECT TO WHALEN'S "SEVERANCE" ARGUMENT.

PARTIES TO THE PROCEEDING IN THE COURT WHOSE JUDGMENT IS UNDER REVIEW

The parties to the proceeding in the Court whose judgment is under review are (1) John R. Whalen and (2) the Commonwealth of Kentucky.

TABLE OF CONTENTS

COUNTERSTATEMENT OF QUESTIONS PRESENTED i

PARTIES TO THE PROCEEDING IN THE COURT WHOSE JUDGMENT IS UNDER REVIEW ii

TABLE OF CONTENTS iii

TABLE OF AUTHORITIES v

OPINION BELOW 2

JURISDICTION 2

CONSTITUTIONAL AND STATUTORY PROVISIONS 3

STATEMENT OF THE CASE 3

REASONS FOR DENYING WRIT 14

I. THE DESCRIPTION IN THE SEARCH WARRANT OF THE THINGS TO BE SEIZED MET THE PARTICULARITY REQUIREMENT OF THE UNITED STATES CONSTITUTION 14

II. THE CONSTITUTION DOES NOT REQUIRE SUPPRESSION OF THE VERY ITEMS SPECIFICALLY DESCRIBED IN THE

AFFIDAVIT IN SUPPORT OF THE SEARCH WARRANT. 25

III. **WHALEN'S "SEVERANCE" ARGUMENT DOES NOT WARRANT CERTIORARI REVIEW.** 31

CONCLUSION 34

TABLE OF AUTHORITIES

CASES CITED: PAGE

Andresen v. Maryland,
427 U.S. 463, 96 S.Ct. 2737, 49 L.Ed 2d 627 (1976) 20

Florida v. Johnson,
605 So.2d 545 (Fla. 1992) 26

Horton v. California,
496 U.S. 128, 110 S.Ct. 2301, 110 L.Ed 2d 112 (1990) .. 23

Horton v. California,
496 U.S. 128, 110 S.Ct. 2301, 110 L.Ed 2d 112 (1990) .. 28

Lo-Ji Sales, Inc. v. New York,
442 U.S. 319, 99 S.Ct. 2319, 60 L.Ed.2d 920 (1979) 25

Maryland v. Garrison,
480 U.S. 79, 84, 107 S.Ct. 1013, 94 L.Ed 2d 72 (1987) .. 15

Maryland v. Garrison,
480 U.S. 79, 87-88, 107 S.Ct. 1013, 94 L.Ed 2d 72 (1987) 32

Massachusetts v. Shepphard,
468 U.S. 981, 104 S.Ct. 3424, 82 L.Ed2d 737 (1984) 24

Stanford v. Texas,
379 U.S. 476, 85 S.Ct. 506, 13 L.Ed.2d 431 (1965) 14

United States v. Calandra,
414 U.S. 338, 348, 94 S.Ct. 613, 38 L.Ed.2d 561 (1974) . 33

United States v. Chadwick,
433 U.S. 1, 97 S.Ct. 2476, 53 L.Ed.2d 538 (1977) 15

United States v Leon,
468 U.S. 897, 104 S.Ct. 3405, 82 L.Ed 2d 677 (1984) . . . 25

United States v. Leon,
468 U.S. 897, 918, 104 S.Ct. 3405, 82 L.Ed.2d 677 (1984) 33

United States v. Ross,
456 U.S. 798, 820-821, 102 S.Ct. 2157, 72 L.Ed 2d 572
(1982) 22

United States v. Ross,
456 U.S. 798, 820-821, 102 S.Ct. 2157, 72 L.Ed 2d 572
(1982) 27

STATE STATUTES CITED:

K.R.S. 531.310 4

FEDERAL STATUTES CITED:

28 U.S.C. §1257(a) 2

UNITED STATES CONSTITUTION CITED:

Fourth Amendment to the United States Constitution 3

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BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

The Commonwealth of Kentucky, by counsel, pursuant to Order of this Court, submits this brief in opposition to the petition for a writ of certiorari.

OPINIONS BELOW

The Opinion of the Kentucky Court of Appeals and the Order of the Kentucky Supreme Court denying discretionary review are referenced at page 2 of the certiorari petition and are reproduced as Appendices A and B to the certiorari petition. The Kenton Circuit Court's written ruling on Whalen's suppression motion is reproduced in part at page 6 of the certiorari petition.

JURISDICTION

The petitioner seeks to invoke the jurisdiction of this Court pursuant to 28 U.S.C. §1257(a). The petition was timely filed.

CONSTITUTIONAL AND STATUTORY PROVISIONS

The petitioner asserts the Fourth Amendment to the United States Constitution as the constitutional provision involved. That Amendment reads as follows:

> The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

COUNTERSTATEMENT OF THE CASE

On December 15, 2000, a Kenton Circuit Court Grand Jury returned an indictment against the petitioner, John Whalen, charging him as follows:

> That prior to October 20, 2000, in Kenton County, Kentucky, John Whalen committed the offense of USE OF A MINOR (UNDER 16 YEARS OLD) IN A SEXUAL PERFORMANCE, a felony, when the Defendant employed, consented to,

> authorized, or induced a minor to engage in a sexual performance, which is in violation of K.R.S. 531.310 and AGAINST THE PEACE AND DIGNITY OF THE COMMONWEALTH OF KENTUCKY.

(State Court Transcript of Record, hereinafter "TR," 14).

Whalen entered into a conditional guilty plea, a procedure authorized by the Kentucky Rules of Criminal Procedure. (TR 61-66; State Court Videotape Record, hereinafter "VT," 02/22/01). Pursuant to that plea, Whalen was adjudged guilty on one count of use of a minor (under 16 years of age) in a sexual performance. He was sentenced to a 12-year term of imprisonment. (TR 71-73).

Whalen's plea was conditioned on the Kenton Circuit Court's ruling on Whalen's motion to suppress evidence obtained in a search, pursuant to a search warrant, of Whalen's residence. (The Kenton Circuit Court's Order ruling on Whalen's suppression motion is contained in the

state court record at TR 52-53). The Kenton Circuit Court overruled the motion to suppress with respect to videos and a video camera seized from the Whalen residence. The Kenton Circuit Court entered its ruling after having had the benefit of an evidentiary hearing, oral arguments of counsel and written argument. (VT, 01/29/01, 02/12/01; TR 16-43, 49-51).

Whalen's motion to suppress focused on the language on the face of the search warrant which described the property to be seized. (TR 22-30). The property to be seized was described on the face of the search warrant as "[v]ideo tapes and video recording equipment." (TR 31; Appendix D to certiorari petition). The affidavit in support of the search warrant also described the property to be seized as video tapes and video recording equipment, but provided additional details:

> Affiant states that on October 20, 2000, Christopher Whalen told the Affiant that while in the residence of his father John Whalen, located at 60 Superior Drive in Ft. Mitchell, Kenton County, Kentucky, he viewed a video tape that showed John Whalen and a minor sitting together on a couch in the above described residence. Christopher Whalen further told Detective R. Johnson that both John Whalen and the male white minor were nude sitting on the couch and masturbating each other. The minor appeared to be approximately 14 years old and the date on the video was October 17, 2000.

(TR 32; Appendix C to certiorari petition).

Detective Ron Johnson of the Ft. Mitchell Police Department was the affiant on the affidavit in support of the search warrant. (TR 32-33; Appendix C to certiorari petition). Det. Johnson is the individual who applied for the search warrant. (VT, 01/29/01, 04:20:25). Det. Johnson was the detective in charge of the investigation. (VT, 01/29/01, 04:27:40).

The affidavit in support of the search warrant was prepared prior to seeking a warrant from the judge who issued the search warrant in this case. (VT, 01/29/01, 04:25:32). The search warrant, itself, was drawn up by the Commonwealth's Attorney's Office prior to application to the judge for the warrant. (VT, 01/29/01, 04:25:40, 04:26:28).

Police reports pertaining to the search warrant were attached as exhibits to Whalen's memorandum in support of his motion to suppress. (TR 41-43). Those police reports were entered by stipulation as evidence at the suppression hearing. (VT, 01/29/01, 05:05:18-05:06:06). Copies of the reports of Det. Johnson and Sgt. Tom Loos are included as an Appendix hereto, and are incorporated by reference.

In October of 2000, Chris Whalen, the son of John Whalen, came to Det. Ron Johnson's office, and provided the

information which Det. Johnson included in the affidavit in support of the search warrant. (VT, 01/29/01, 04:20:55-04:22:10, 04:23:34, 05:02:52, 05:03:07, 05:03:34; TR 42). Det. Johnson applied for the search warrant on October 20, 2000, and the search warrant was executed on October 20, 2000. (VT, 01/29/01, 04:22:25, 05:06:14; Appendix hereto).

Four officers participated in the execution of the search warrant: Det. Johnson, Sgt. Loos, Specialist Taylor, and Sgt. Bussman. Det. Johnson and Sgt. Loos testified at the evidentiary hearing on Whalen's motion to suppress. The roles of Specialist Taylor and Sgt. Bussman, who did not testify at the evidentiary hearing, were limited in the execution of the search warrant. Specialist Taylor stayed upstairs with Mrs. Whalen during the search. Sgt. Bussman's job was to shadow Mr. Whalen during the search. (VT, 01/29/01, 04:45:04, 04:45:25, 04:47:02).

When the police got to the Whalen residence on October 20, 2000 and read the search warrant to Whalen, Whalen said he knew what the police were looking for. Whalen took Det. Johnson straight to a footlocker in the basement of the Whalen home. (VT, 01/29/01, 04:33:45; TR 41; Appendix hereto).

Whalen wanted to know if the police had to go through the footlocker at the residence while Whalen's wife was present at the residence. (VT, 01/29/01, 05:00:23, 05:00:56-05:01:07). Det. Johnson said he did. (VT, 01/29/01, 05:01:08).

Whalen gave Det. Johnson a key to open the footlocker. Whalen also advised Det. Johnson that it was necessary to use a knife in conjunction with the key to open the footlocker. (VT, 01/29/01, 04:58:07). When Det. Johnson opened the footlocker, he immediately saw

magazines which appeared to have minors on the cover and had titles implying the minors engaged in sexual acts. (VT, 01/29/01, 04:32:09-04:32:28). The footlocker contained videotapes and magazines. In all, 159 items were contained in the footlocker. The items were inventoried in a list. (TR 34; VT, 01/29/01, 04:31:25, 04:32:48; Appendix E to certiorari petition). Because of the sheer number of items contained in the footlocker and the fact that there was no way for the police to ascertain what each of those items contained without viewing the items, a decision was made to seize the contents of the footlocker rather than view each of the items separately there at the Whalen residence. (VT, 01/29/01, 04:30:03, 04:32:33-04:32:47, 04:59:03).

The information the police had obtained from Chris Whalen was that the tape for which they specifically were looking, the videotape of Whalen and the unknown boy, was

in a camera. The police did a cursory look through the footlocker for a camera but found none. ((VT, 01/29/01, 04:38:65-04:38:26). The search for the camera continued at the Whalen residence, to determine if there was a tape still in the camera. (VT, 01/29/01, 04:38:34).

Det. Johnson asked Whalen if there was a small hand-held video camera in the residence. (VT, 01/29/01, 04:40:11-04:40:27). Sgt. Loos also asked Whalen about the camera and tape. (VT, 01/29/01, 04:40:45).

Whalen asked Sgt. Loos why the camera was important. Sgt Loos informed Whalen the camera and videotape in the camera were named in the search warrant. At the evidentiary hearing on Whalen's motion to suppress, Sgt. Loos explained that he still believes that those items were named in the search warrant. It was his belief that the search warrant instructed the officers to look for the camera,

the tape it contained and other videotapes. (VT, 01/29/01, 05:15:29-05:17:10, 05:17:56).

Whalen asked Sgt. Loos what Sgt. Loos believed the videotape would show. Sgt. Loos explained he believed the videotape would show Whalen and a teenager masturbating. (VT, 01/29/01, 05:17:47, 05:17:58).

Whalen then asked if the fact that the teenager consented would make a difference. Sgt. Loos responded that there were several factors to be considered. Sgt. Loos explained at the evidentiary hearing that two factors came to his mind at the time: The age of the participant and what acts were performed. Sgt. Loos further explained that he was aware at the time the search warrant was executed of the affidavit in support of the search warrant which stated that Chris Whalen had seen a video of John Whalen and a person unknown to Chris Whalen, a person who appeared to be a

minor, masturbating. Sgt. Loos explained at the hearing he was aware that Chris Whalen had given this information to Det. Johnson, and that Det. Johnson had signed the affidavit. (VT, 01/29/01, 05:18:48-05:21:13).

Whalen asked the officers how long the officers were going to search. The officers responded that they were going to search everywhere that the camera could possibly be located. At that point, Whalen turned over the camera. (VT, 01/29/01, 05:26:00-05:26:21).

REASONS FOR DENYING WRIT

I.

THE DESCRIPTION IN THE SEARCH WARRANT OF THE THINGS TO BE SEIZED MET THE PARTICULARITY REQUIREMENT OF THE UNITED STATES CONSTITUTION.

Whalen argues the search warrant at issue in the case at bar did not meet the particularity requirement of the Fourth Amendment to the United States Constitution. He contends the warrant failed to describe with particularity the things to be seized.

It is important to note at the outset what the language employed in the warrant which issued in the case at bar was not designed to do. Whalen's citation to Stanford v. Texas, 379 U.S. 476, 85 S.Ct. 506, 13 L.Ed.2d 431 (1965) notwithstanding, in Whalen's case the description in the warrant of the things to be seized was not designed to authorize seizure of things based

on the *ideas* contained in those things. The language employed in the search warrant in the case at bar was designed to authorize seizure of video evidence of Whalen engaging in sex acts with a minor.

Constitutional warrant requirements are designed to provide protection from *unreasonable* searches and seizures. As the Court stated in United States v. Chadwick, 433 U.S. 1, 97 S.Ct. 2476, 53 L.Ed.2d 538 (1977):

> Our fundamental inquiry in considering Fourth Amendment issues is whether or not a search or seizure is reasonable under all the circumstances.

Id., 433 U.S. at 9 (internal footnotes and cases cited in footnotes omitted).

The particularity requirement of the Fourth Amendment is designed to prohibit exploratory general searches. Maryland v. Garrison, 480 U.S. 79, 84, 107 S.Ct. 1013, 94 L.Ed 2d 72 (1987). The search warrant in Whalen's case did not leave to

the unfettered discretion of the executing officers the question of what type of item or items to seize at Whalen's residence. It did not purport to authorize an exploratory general search.

The property to be seized was described on the face of the search warrant as "[v]ideo tapes and video recording equipment." (Appendix D to certiorari petition). The search warrant specifically recited that it was based upon application for the search warrant having been made "by affidavit." (Id.). The affidavit in support of the search warrant also described the property to be seized as video tapes and video recording equipment, but provided additional details:

> Affiant states that on October 20, 2000, Christopher Whalen told the Affiant that while in the residence of his father John Whalen, located at 60 Superior Drive in Ft. Mitchell, Kenton County, Kentucky, he viewed a video tape that showed John Whalen and a minor sitting together on a couch in the above described residence. Christopher Whalen further told Detective R. Johnson that both

> John Whalen and the male white minor were nude sitting on the couch and masturbating each other. The minor appeared to be approximately 14 years old and the date on the video was October 17, 2000.

(Appendix C to certiorari petition).

The affiant to the affidavit in support of the search warrant, Det. Ron Johnson of the Fort Mitchell Police Department, was the detective in charge of the investigation in Whalen's case. (VT, 01/29/01, 04:27:40; Appendix C to certiorari petition). Detective Johnson was one of four officers participating in the execution of the search warrant at Whalen's residence. The roles of two of the officers participating in the execution of the search warrant, Taylor and Bussman, were limited to keeping an eye on Mr. and Mrs. Whalen during the execution of the search warrant. (VT 01/29/01, 04:45:04, 04:45:25, 04:45:25, 04:47:02). Hence, the only two officers

actively engaged in the search of the Whalen residence were Det. Johnson and Sgt. Loos.

Since Det. Johnson was in fact the affiant to the affidavit in support of the search warrant, he was aware of the nature of the videotape or videotapes being sought in the search, as well as the fact that a video tape might still be in a video camera at Whalen's residence. (See Appendix C to certiorari petition; Appendix B[1] hereto). The record also establishes that Sgt. Loos was aware of the nature of the video tape or video tapes for which he was searching at the Whalen's residence, as well as the fact that the videotape might be contained in a video camera

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[1]The police reports contained in the appendix to this brief in opposition were originally attached as exhibits to Whalen's memorandum in the state court in support of his motion to suppress. (TR 41-43). Those police reports were entered by stipulation as evidence at the state court suppression hearing. (VT, 01/29/01, 05:05:18 - 05:06:06).

at Whalen's residence. (VT 01/29/01, 05:17:47, 05:17:58; Appendix C hereto).

Sgt. Loos testified at the state court suppression hearing concerning what he believed the video tape or video tapes he was searching for would show: Whalen and a teenager masturbating together. (VT, 01/29/01, 05:17:47, 05:17:58). Sgt. Loos, like Det. Johnson, was looking for a video tape or video tapes consistent with the conduct described in the affidavit in support of the search warrant. (See Appendix C to certiorari petition and Appendix B to this brief in opposition). The search warrant in the case at bar was in fact designed to authorize seizure of video documentation of Whalen engaging in sex acts with a minor.

The sufficiency of the description in the search warrant of the property to be seized is to be viewed in light of the information known to the police officers and the issuing court

at the time search warrant issued. Maryland v. Garrison, *supra*, 480 U.S. at 85-86. If additional facts are later discovered in executing a search warrant which with benefit of hindsight render the description of the property to be seized arguably broader than appropriate, the question then becomes one of the reasonableness of the manner of execution rather than one of whether the warrant described the property to be seized with sufficient particularity to pass constitutional muster. Maryland v. Garrison, *supra*.

Moreover, the fact that the warrant for a search of Whalen's residence referred to videotapes in the plural did not convert the search warrant into an exploratory general warrant. In Andresen v. Maryland, 427 U.S. 463, 96 S.Ct. 2737, 49 L.Ed 2d 627 (1976), for example, the Court found that a search warrant did not violate the constitutional prohibition against general search warrants where the warrant authorized

seizure of "other fruits, instrumentalities and evidence of [the] crime [of false pretenses] at (this) time unknown." *Id.*, 427 U.S. at 479, 480-481.

Ironically, in the case at bar Whalen seeks to force suppression of the specific videotape which was described in the affidavit in support of the search warrant. In his certiorari petition Whalen seeks, as he did in the state court, to exploit the consequences of his actions when the executing officers arrived at his residence to execute the search warrant. When the police got to the Whalen residence and read the search warrant to Whalen, Whalen said that he knew what the police were looking for and took them straight to a footlocker in the basement of the Whalen home. (VT, 01/29/01, 04:33:45; certiorari petition at pages 3-4). When Det. Johnson opened that footlocker, Det. Johnson immediately saw magazines which appeared to have minors on the cover, and which had

titles implying that minors were engaging in sexual acts. (VT, 01/29/01, 04:32:09 - 04:32:28). The salient point for the purpose of deciding whether the search warrant, itself, described the items to be seized with sufficient particularity is this: Whether seizure of items contained in the trunk was or was not expressly authorized by the language of the search warrant, the limited initial *search* of the footlocker was within the scope of the place to be searched. The police opened the footlocker to begin with because that is where Whalen took them in response to having been read the search warrant.

"A lawful search of fixed premises generally extends to the entire area in which the object of the search may be found and is not limited by the possibility that separate acts of entry or open maybe required to complete the search." United States v. Ross, 456 U.S. 798, 820-821, 102 S.Ct. 2157, 72 L.Ed 2d 572 (1982). "[N]ice distinctions between closets, drawers, and

containers, in the case of a home, or between upholstered seats, trunks, and wrapped packages, in the case of a vehicle, must give way to the interest in the prompt and efficient completion of the task at hand." *Id.*, 456 U.S. at 821.

In addition, if evidence of crime is in plain view, police officers may seize that evidence without a warrant regardless of whether the discovery of that evidence was inadvertent. Horton v. California, 496 U.S. 128, 110 S.Ct. 2301, 110 L.Ed 2d 112 (1990). The potential evidentiary value of the items in Whalen's footlocker is addressed in argument II herein, but it is worth noting at this point that whether the officers ultimately were or were not correct in their assessment of the evidentiary potential of the items in the footlocker, an objectively reasonable mistake in the execution of the search warrant does not require suppression of the valid fruits of the search. Maryland v. Garrison, *supra*, 480 U.S. at 87-88. A cursory

review of Appendix E to the certiorari petition, which contains titles for the 159 items found in the footlocker, will readily reveal why police officers thought the footlocker contained evidence of crime.

In assessing whether the description of the items to be seized was set forth with sufficient particularity in the search warrant, it matters not, as Whalen contends, that the language might have been drafted with even greater precision in light of matters which came to light in executing the search warrant. Maryland v. Garrison, *supra*. The search warrant was valid when issued. *Id.* Alternatively, assuming for the sake of argument only that the description in the search warrant of the things to be seized was overly broad, the executing officers' good faith reliance on that warrant precludes suppression as a remedy in Whalen's case. Massachusetts v. Shepphard, 468 U.S. 981, 104 S.Ct. 3424, 82 L.Ed2d 737 (1984); *see also*,

United States v Leon, 468 U.S. 897, 104 S.Ct. 3405, 82 L.Ed 2d 677 (1984).

Certiorari review is not warranted.

II.

THE CONSTITUTION DOES NOT REQUIRE SUPPRESSION OF THE VERY ITEMS SPECIFICALLY DESCRIBED IN THE AFFIDAVIT IN SUPPORT OF THE SEARCH WARRANT.

Arguments I and III herein are incorporated by reference.

Unlike Lo-Ji Sales, Inc. v. New York, 442 U.S. 319, 99 S.Ct. 2319, 60 L.Ed.2d 920 (1979), in which police were given carte blanche authority to seize items the executing officers in their judgment felt to be obscene, the search warrant in the case at bar did not issue to authorize seizure of things based on the *ideas* contained in those things. The language employed in the search warrant in the case at bar was designed to authorize

seizure of video evidence of Whalen engaging in sex acts with a minor.

As for Florida v. Johnson, 605 So.2d 545 (Fla. 1992), whatever the merits of that case holding may be, the case at bar simply is not a case where the executing officers flagrantly disregarded the terms of the warrant. In the case at bar, when the police got to the Whalen residence and read the search warrant to Whalen, Whalen said that he knew what the police were looking for and took them straight to a footlocker in the basement of the Whalen home. (VT, 01/29/01, 04:33:45; certiorari petition at pages 3-4). When Det. Johnson opened that footlocker, Det. Johnson immediately saw magazines which appeared to have minors on the cover, and which had titles implying that minors were engaging in sexual acts. (VT, 01/29/01, 04:32:09 - 04:32:28). The executing officers in the

case at bar did not arbitrarily take it upon themselves to go searching for items beyond the scope of the warrant.

Whether seizure of items contained in the trunk was or was not expressly authorized by the language of the search warrant in the case at bar, the limited initial *search* of the footlocker was within the scope of the place to be searched. The police opened the footlocker to begin with because that is where Whalen took them in response to having been read the search warrant. "A lawful search of fixed premises generally extends to the entire area in which the object of the search may be found and is not limited by the possibility that separate acts of entry or open maybe required to complete the search." United States v. Ross, 456 U.S. 798, 820-821, 102 S.Ct. 2157, 72 L.Ed 2d 572 (1982). "[N]ice distinctions between closets, drawers, and containers, in the case of a home, or between upholstered seats, trunks, and wrapped packages, in the case of a vehicle,

must give way to the interest in the prompt and efficient completion of the task at hand." *Id.*, 456 U.S. at 821.

In addition, if evidence of crime is in plain view, police officers may seize that evidence without a warrant regardless of whether the discovery of that evidence was inadvertent. Horton v. California, 496 U.S. 128, 110 S.Ct. 2301, 110 L.Ed 2d 112 (1990). Whether the executing officers in the case at bar ultimately were or were not correct in their assessment of the evidentiary potential of the items in the footlocker, an objectively reasonable mistake in the execution of the search warrant does not require suppression of the valid fruits of the search. Maryland v. Garrison, *supra*, 480 U.S. at 87-88. A cursory review of Appendix E to the certiorari petition, which contains titles for the 159 items found in the footlocker, will readily reveal why police officers thought the footlocker contained evidence of crimes involving minors. Moreover, a

review of the titles of items seized from the footlocker reveals that more than a few appear to evidence a prurient interest in nude minors and sexual acts by minors, and hence might appear to have potential evidentiary value with respect to the sexual acts with a minor captured on the video tape described in the affidavit in support of the search warrant.

As for the items actually seized in the execution of the search warrant at the Whalen house, the Commonwealth advised the defense and the state trial court that the Commonwealth had no intention of introducing during its case-in-chief any of the items contained in the footlocker seized at the Whalen residence. (VT, 01/29/01, 12:10:14-12:13:26). The practical effect of the state trial court's subsequent ruling on Whalen's suppression motion was that the only items seized at the Whalen residence which were expressly not suppressed were the video tape described in the affidavit in support of the

search warrant -- and the camera, also referenced in the affidavit in support of the search warrant, in which that video tape was found.

The Commonwealth did advise the state trial court and the defense that it could not guarantee the Commonwealth might not wish to introduce some of the items from the footlocker in rebuttal at trial, depending on what the testimony the defense might produce at trial. (VT, 01/29/01, 12:10:14-12:13:26). The state trial court therefore ruled as follows a with respect to the items from the footlocker:

> FURTHER, the defendant's motion to suppress, as it relates to all other items seized, is TAKEN UNDER SUBMISSION. If the Commonwealth seeks to admit any of these items in evidence, it shall promptly notify counsel for the defendant, and this issue will be reconsidered by the court upon request of the defendant.

(TR 52-53; certiorari petition, p. 6).

Rather than insist on a final ruling on his suppression motion with regard to items from the footlocker, Whalen entered into a conditional guilty plea. (TR 61-66; State Court Videotape Record, hereinafter "VT," 02/22/01).

Certiorari review is not warranted.

III.

WHALEN'S "SEVERANCE" ARGUMENT DOES NOT WARRANT CERTIORARI REVIEW.

Arguments I and II herein are incorporated by reference.

The state trial court ruled as follows a with respect to the items from the footlocker:

> FURTHER, the defendant's motion to suppress, as it relates to all other items seized, is TAKEN UNDER SUBMISSION. If the Commonwealth seeks to admit any of these items in evidence, it shall promptly notify counsel for the defendant, and this issue will be reconsidered by the court upon request of the defendant.

(TR 52-53; certiorari petition, p. 6).

Rather than insist on a final ruling on his suppression motion with regard to items from the footlocker, Whalen entered into a conditional guilty plea. (TR 61-66; State Court Videotape Record, hereinafter "VT," 02/22/01).

An objectively reasonable mistake in the execution of a search warrant does not require suppression of the valid fruits of the search. Maryland v. Garrison, 480 U.S. 79, 87-88, 107 S.Ct. 1013, 94 L.Ed 2d 72 (1987); The seized video tape which was expressly not suppressed in the state court was the very video tape described in the affidavit in support of the search warrant, a video tape which documented Whalen and a minor engaged in masturbation. The fact that the police also seized items in a footlocker to which Whalen led them when he was read the warrant, items which appeared to document sex acts with minors, simply does not implicate the draconian sanction of suppression of all seized evidence. Suppression "is

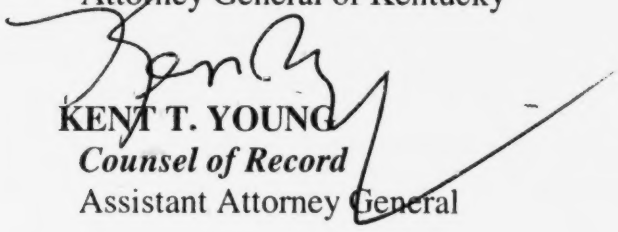
a judicially created remedy designed to safeguard Fourth Amendment rights generally through its deterrent effect, rather than a personal constitutional right of the party aggrieved." United States v. Calandra, 414 U.S. 338, 348, 94 S.Ct. 613, 38 L.Ed.2d 561 (1974). "[S]uppression of evidence obtained pursuant to a warrant should be ordered only on a case-by-case basis and only in those unusual circumstances in which exclusion will further the purpose of the exclusionary rule." United States v. Leon, 468 U.S. 897, 918, 104 S.Ct. 3405, 82 L.Ed.2d 677 (1984).

Certiorari review is not warranted.

CONCLUSION

WHEREFORE, certiorari review should be denied.

ALBERT B. CHANDLER III
Attorney General of Kentucky



KENT T. YOUNG
Counsel of Record
Assistant Attorney General

No. 03-226

IN THE
Supreme Court of the United States

JOHN R. WHALEN,
Petitioner

versus

COMMONWEALTH OF KENTUCKY,
Respondent

APPENDIX TO BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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TABLE OF APPENDICES

A. R. Johnson police report re search warrant execution.

B. R. Johnson police report re Chris Whalen statement.

C. Sergeant Loos police report.

APPENDIX A

Fort Mitchell Police

At approxi. 4:17pm this Officer along with Sgt. Tom Loos responded to 60 Superior to execute a search warrant at the Whalen residence. This Officer knocked on the front door and was greeted by Mrs. Whalen. I asked her if Mr. Whalen was at home. She stated that he was and he then came to the door. I identified myself to Mr. Whalen and read the search warrant to him. Upon entering the residence Mr. Whalen stated that he knew what we were looking for and that he would take me to it and show me. Sgt. Bussman and Spl. Taylor joined us. Spl. Taylor walked into the dinning room with Mrs. Whalen and Sgt. Bussman and myself were led to the basement by Mr. Whalen. Sgt. Loos went to the second floor to begin a search in the bedroom. Mr. Whalen took me behind the bar where a footlocker was located. Mr. Whalen stated that he keeps adult videos he has locked in there. I asked Mr. Whalen if he had the key. Mr. Whalen asked me if I had to open it. I advised him that I did. He handed me the key to the footlocker and then stated that we

had to use knife to turn the lock after the padlock was removed. Mr. Whalen was then asked if he owned a small hand held video camera. He stated that he did but that he had loaned it out to a friend and did not want to tell us to who out of fear of getting them in trouble. I then continued my search of the basement. Sgt. Loos came to the basement and had a conversation with Mr. Whalen which resulted in Mr. Whalen taking Sgt. Loos to the location of the camera and spoke briefly to investigators about the contents of the tape. (details see Sgt. Loos report).

The search was concluded and items seized were noted on the back of the search warrant and a copy left at the residence.

Investigation continuing.

Det. R. Johnson

APPENDIX B

Fort Mitchell Police

Statement of Christopher Whalen on 10/19/2000

At Approx. 1:10pm on 10/20/2000 a subject identified as Christopher Whalen stopped in the Ft. Mitchell Police Dept. to report items that he saw in his Fathers residence that he felt were disturbing and should be reported to the Police. Chris stated that he found a small hand held camera in his Fathers bedroom dresser drawer on 10/19/2000. He stated that he looked at the contents of the tape and saw a video of his Father seated on the couch in the residence with his pants around his ankles and seated next to him was a male subject that appeared to him to be around the age of 14 to 15 yrs of age. This subject also had his pants around his ankles and his Father was masturbating the subject. Chris stated that his motivation to report this was not of vengeance and he was wrestling with the decision to report it to the Police. Chris further stated that he was so upset about the tape that he felt if it were anybody else he would report it and felt that he should do the same with this. Chris also stated that his father

keeps a footlocker locked in the basement and several years ago when he was a child he saw a video his father had of a child involved in sex and that he knew that his Father kept these type of videos in that footlocker.

Det. R. Johnson.